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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IN RE: CAROLINA MOTOR EXPRESS, INC.,
Debtor

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE FOR
CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the Interstate Commerce Act allow a shipper to ignore 49 U.S.C. Section 10761, delaying payment of the filed rate for years, by asserting rate reasonableness as a defense to a carrier's action for its transportation charges?

PARTIES TO THE PROCEEDING BELOW

Appellants in the United States Court of Appeals for the Fourth Circuit and Respondents herein are Langdon M. Cooper, Trustee for the estate of Carolina Motor Express, Inc. (a former motor common carrier regulated by the Interstate Commerce Act), and Mark & Associates of North Carolina, a rate auditing firm hired by the Trustee, pursuant to Court Order, to audit Carolina Motor Express, Inc.'s freight bills.

Appellees in the United States Court of Appeals for the Fourth Circuit and Petitioners herein, are California Consolidated Enterprises, Inc., a former broker of motor carrier transportation which had been licensed by the Interstate Commerce Commission * and Peter C. Reiter, a sole proprietor, and a broker of motor carrier transportation licensed by the Interstate Commerce Commission.

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* By decision MC-164423 (Sub 3-R1R), served June 20, 1990, after prior notice that its authority would be revoked for failure to maintain a surety bond, California Consolidated Enterprises, Inc. requested and received revocation of its authority to conduct operations as a broker pursuant to 49 U.S.C. Section 10925(b). *See* Appendix A hereto at 1a-6a.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinions below are adequately set forth in the Brief For The Petitioner.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief For The Petitioner.

STATUTES INVOLVED

In addition to the statutes set forth in the Brief For The Petitioner the following statutes are involved:

The Tucker Act, 31 U.S.C. Section 3726 provides:

> (a) A carrier or freight forwarder presenting a bill for transporting an individual or property for the

United States Government may be paid before the Administrator of General Services conducts an audit, in accordance with regulations that the Administrator shall prescribe. A claim under this section shall be allowed only if it is received by the Administrator not more than 3 years (excluding time of war) after the later of the following dates:

(1) accrual of the claim;

(2) payment for the transportation is made;

(3) refund for an overpayment for the transportation is made; or

(4) a deduction under subsection (b) of this section is made.

(b) Not later than 3 years (excluding time of war) after the time a bill is paid, the Government may deduct from an amount subsequently due a carrier or freight forwarder an amount paid on the bill that was greater than the rate allowed under—

(1) a lawful tariff on file with the Interstate Commerce Commission, the Secretary of Transportation with respect to foreign air transportation (as defined in the Federal Aviation Act of 1958 [49 USCS Appx. Sections 1301 et seq.]) Civil Aeronautics Board, the Federal Maritime Commission or a State transportation authority; or

(2) sections 10721-10724 of title 49 [49 USCS Sections 10721-10724] or an equivalent arrangement or an exemption.

(c) Expenses of transportation audit contracts and contract administration shall be financed from overpayments collected from carriers on transportation bills paid by the Government and other similar type refunds at not to exceed 40 percent of such collections annually. Payment to any contractor shall not exceed 50 percent of the overpayments identified by any contract audit.

(d) At least annually, and as determined by the Administrator, after making adequate provision for

expenses of refunds to carriers, transportation audit contracts, and contract administration authorized in subsection (c), the balance of the overpayments collected by the General Services Administration shall be transferred to miscellaneous receipt of the Treasury. A report of receipts, disbursements, and transfers (to miscellaneous receipts) pursuant to this section shall be made annually in connection with the budget estimates by the Director of the Office of Management and Budget and to the Congress.

(e) The Administrator may delegate any authority conferred by this section to another agency or agencies if the Administrator determines that such a delegation would be cost-effective or otherwise in the public interest.

(f) Under regulations the head of an agency prescribes that conform with standards the Secretary of the Treasury and the Comptroller General prescribe jointly, a bill under this section may be paid before the transportation is completed notwithstanding section 3324 of this title when a carrier or freight forwarder issues the annual document for the transportation. Payment for transportation ordered but not provided may be recovered by deduction or other means.

(g) (1) A carrier or freight forwarder may request the Comptroller General to review the action of the Administrator if the request is received not later than 6 months (excluding time of war) after the Administrator acts or within the time stated in subsection (a) of this section, whichever is later. (2) This section does not prevent the Comptroller General from conducting an audit under chapter 35 of this title.

Section 10708(a)-(c) of the Interstate Commerce Act, 49 U.S.C. Section 10708(a)-(c) provides:

(a) (1) The Interstate Commerce Commission may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule or practice immedi-

ately, on its own initiative or on application of an interested party when—

(A) a new individual or joint rate or individual or joint classification, rule, or practice affecting a rate is filed with the Commission by a common carrier, other than a rail carrier under this subtitle; or

(B) a new or reduced rate or rule or practice that causes a reduction of a rate is filed with the Commission by a contract carrier under this subtitle.

(2) The Commission must give reasonable notice before beginning a proceeding under this section but may act without allowing an interested carrier to file an answer or other formal pleading in response to its decision to begin the proceeding. The Commission may take whatever final action on a rate, classification, rule or practice under this section, after a full hearing (whether completed before or after the rate, classification, rule, or practice goes into effect), as it could in a proceeding begun after a rate, classification, rule, or practice became effective.

(b) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice at any time for not more than 7 months beyond the time it would otherwise go into effect by (1) delivering to each affected carrier, and (2) filing with the proposed rate, classification, rule, or practice, a statement of reasons for the suspension. If the Commission does not take final action during the suspension period, the proposed rate, classification, rule, or practice is effective at the end of that period. However, if an increase in a rate for, or related to, transportation of property by an express, sleeping car, or pipeline carrier becomes effective under this subsection, the Commission may require the interested carrier to account for all amounts received under it and specify by whom and on whose behalf those amounts were paid. When the Commission takes final action, it may require the carrier to

refund, with interest, to the persons on whose behalf those amounts were paid, the part of the increased rate found to be in violation of this subtitle.

Section 11705 of the Interstate Commerce Act, 49 U.S.C. Section 11705 provides in pertinent part that:

(a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] or a freight forwarder does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.

(b)(1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] or a freight forwarder is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title [49 USCS §§ 10761 et seq.].

(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.] is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title [49 USCS §§ 10521 et seq. or 10561 et seq.] or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c)(1) a person may file a complaint with the Commission under section 11701(b) of this title [49 USCS § 11701(b)] or bring a civil action under subsection (b)(1) or (2) of this section to enforce

liability against a comon carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.]. A person may begin a proceeding under section 10704 or 10705 of this title [49 USCS § 10704 or 10705] to enforce liability under subsection (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title [49 USCS § 11701(b)].

COUNTERSTATEMENT OF THE CASE

Petitioner California Consolidated Enterprises, Inc. (hereinafter "CCE" or "Petitioner") was a broker of motor carrier transportation until its authority was revoked by the Interstate Commerce Commission (hereinafter "Commission"). It arranged transportation services by motor carriers operating under the authority of the Interstate Commerce Act (hereinafter the "Act"), 49 U.S.C. Section 10101 et seq. (1982), for the shipping public. It provided these services pursuant to a broker's license issued to it by the Commission. During 1984 to 1986 CCE tendered freight to Carolina Motor Express, Inc. (hereinafter "CMX") for transportation in interstate commerce.

Petitioner Peter Reiter (hereinafter "Reiter" or "Petitioner") is similarly a broker of motor carrier transportation, licensed by the Commission to perform these services. Reiter also tendered freight to CMX during 1984 to 1986 for transportation in interstate commerce.

The bankruptcy proceedings which have lead to this dispute, commenced with the filing in 1986 of a petition under Chapter 11 of the United States Bankruptcy Code (hereinafter "Bankruptcy Code"), 11 U.S.C. Section 101 et seq. (1978), by CMX, a motor common carrier. This was later converted to a petition for relief pursuant to Chapter 7 of the Bankruptcy Code. Langdon M. Cooper was appointed Trustee (hereinafter "Trustee") of the estate while the proceedings were still under Chapter 11.

As a motor common carrier, CMX had various tariffs on file with the Commission. Mark & Associates of North Carolina (hereinafter "Mark & Associates"), is a rate auditing company hired by the Trustee, pursuant to Court Order, to audit CMX's freight bills. Mark & Associates audited the freight bills for shipments transported by CMX for Petitioners. The audit for CCE's shipments revealed freight undercharges owed to CMX in the amount of $58,793.03. The audit for Reiter's shipments revealed freight undercharges in the amount of $13,795.73. The Trustee and Mark & Associates (collectively referred to as "Respondents") brought actions to collect these amounts in the United States Bankruptcy Court for the Western District of North Carolina. (Joint Appendix [1] at 14 and 20).

The record reflects that this is a typical "negotiated rates case" of the type reviewed by this Court in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 111 L.Ed. 2d 94, 110 S.Ct. 2759 (1990). CMX agreed with Petitioners to handle their freight at negotiated rates not contained in CMX's published tariff. *See* Petition For Writ of Certiorari, Appendix at 4a. The Petitioners did not dispute the applicability of CMX's filed rates, nor did they claim that CMX's rates were in any way ambiguous or subject to differing interpretations. Rather, the Petitioners defenses to the actions were based solely upon the fact that each had relied upon CMX's agreement to handle their freight at the agreed upon rates without regard to whether or not the rates were filed by CMX with the Commission. The bankruptcy court found such reliance unreasonable, but even if it were reasonable, because the filed-rate doctrine precluded Petitioners' assertion of equitable defenses to the carrier's undercharge claims, the

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[1] Hereinafter referred to as "J.A."

[2] *National Indus. Transp. League—Petition to Institute Rate-making On Negotiated Motor Common Carrier Rates*, 3 I.C.C. 2d 99 (1986); *Petition to Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 5 I.C.C. 2d 623 (1989).

Trustee was entitled to judgment regardless of the conduct of CMX. 84 B.R. 979 (Bankr. W.D.N.C. 1988).

On appeal, the district court relying on the Commission's *Negotiated Rates* policy statement, Ex Parte No. MC-177,[2] reversed the final judgments of the bankruptcy court and referred to the Commission the question of whether the Trustee's collection of the undercharges would amount to an unreasonable practice. Respondents appealed the district court decision. Thereafter this Court issued its decision in *Maislin* striking down the Commission's policy statement in *Negotiated Rates*.

Pursuant to *Maislin* the Fourth Circuit vacated the district court's reversal of the bankruptcy court's judgment and remanded these cases to the district court with instructions that the judgment of the bankruptcy court be reinstated. 949 F.2d 107 (4th Cir. 1991). In its decision the Fourth Circuit agreed with the Fifth Circuit view expressed in *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 385 (5th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990),[3] that allegations of rate reasonableness may not be considered by a court, nor should a court interfere with the collection of a filed rate by staying the court action pending Commission review of the reasonableness of the filed rates. Instead, the Fourth Circuit ordered that the district court enforce the unambiguous tariff of CMX. Petitioners initially filed a Petition for Writ of Certiorari on February 4, 1992, however that petition was rejected by this Court and Petitioners refiled on March 16, 1992. Respondents filed their opposition to Petitioners' Writ of April 15, 1992. This Court granted *certiorari* on May 18, 1992. —— U.S. ——, 118 L.Ed. 2d 541 (1992).

[3] *Caravan* has been recently overturned by a different panel in *Advance United Expressways, Inc. v. Eastman Kodak*, —— F.2d ——, No. 91-1320, 1992 WL 142813 (5th Cir. June 26, 1992), a petition for rehearing is pending.

SUMMARY OF ARGUMENT

This Court in *Maislin* reaffirmed that "[c]ompliance with §§ 10761 and 10762 [the filed-rate doctrine] is 'utterly central' to the administration of the Act." 111 L.Ed. 2d at 112. "Unless and until suspended or set aside, [the filed rate] is made for all purposes, the legal rate as between shipper and carrier." 111 L.Ed. 2d at 108 (twice quoting this statement from *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922)). Although the Commission has never suspended or set aside the filed rates which apply to Petitioners' freight, Petitioners have unilaterally disregarded those rates for the past seven years, by merely alleging that those rates are unreasonable. Petitioners, with the support of their Amici,[4] argue that such conduct is acceptable at least with regard to an insolvent carrier because the filed-rate doctrine is controlled by a more "central" reasonable rates doctrine. In so doing, Petitioners and their Amici have rewritten the Act and have disregarded over 100 years of unbroken interpretation of the Act by this Court.

This Court's precedent has uniformly held that "[u]nder [the Act] the shipper was bound to pay the legal rates; but if he could show that it was unreasonable, he might recover reparation." *Arizona Grocery Co. v. Atchison, T. & S.F.R. Co.*, 284 U.S. 370, 384-85 (1932). Where private litigants have sought to avoid the imposition of filed rates thought to be unreasonable, these litigants have been denied by Congress, and this Court, the right to delay payment by claiming carrier's rates to be unreasonable. *See Crancer v. Lowden*, 315 U.S. 631 (1942). Instead, shippers must pay first and then challenge the reasonableness of a carrier's rates. *Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co.*, 330 U.S. 247

[4] The Interstate Commerce Commission filed an *Amici Curiae* brief in support of Petitioners. The brief will be referenced as ICC Brief at ——. A group of seven national organizations of shippers and transportation brokers filed an *Amici Curiae* brief in support of Petitioners. The brief will be referenced as NITL Brief at ——.

(1913) and *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184 (1913).

The only exception to the "pay first" rule of the filed-rate doctrine is when the United States is the shipper. *See United States v. Western Pac. R.R.*, 352 U.S. 59 (1956). Pursuant to the Tucker Act, 31 U.S.C. Section 3726, Congress has authorized the United States to withhold payment from carriers by setting off potential claims. This right of set off is 'unique," i.e. *not* available to private shippers. *See* ICC Brief at 13, n.7.

Because the Act must be interpreted based upon its plain meaning, this Court held in *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), that the Act, as then written, failed to provide *any* relief (affirmative or defensive) to shippers (both the U.S. Government and private shippers) for the imposition of a filed motor common carrier rate thought to be unreasonable. Thereafter, in 1965, Congress specifically authorized a reparations procedure for all shippers. Pub. L. 89-170, 79 Stat. 65 [now codified at Sections 11705(b)(3) and (c)(1) and 11706(c)(2).] Congress in 1965 did not expand the Tucker Act to include private shippers. Thus, it cannot be reasonably argued that the reparations remedy provided by Congress in 1965, would allow a private shipper to withhold paying a carrier who sued for its filed rate charges by setting off its potential claim of rate unreasonableness. Otherwise, there would be no need for the Tucker Act to remain on the books after 1965.

The interplay between the filed rate requirements of Sections 10761(a) and 10762 and the reasonable rates requirement of Section 10701(a) has been reconciled by this Court for over a century. There has never been a problem with establishing which section governs a particular situation. "[T]he filed rate governs the legal relationship between shipper and carrier." *Maislin*, 111 L.Ed. 2d at 108. The filed rate must be enforced, without exception, unless or until the Commission finds the

rate no longer applicable because of a violation of Section 10701(a). *Keogh*, 260 U.S. at 163. The basis of the filed-rate doctrine is not, as Petitioners and their Amici argue, to ensure the reasonableness of filed rates, but rather the "stringent rule prevails, because otherwise *the paramount purpose of Congress—prevention of unjust discrimination* —might be defeated." 260 U.S. at 165. (emphasis supplied). In failing to promptly pay filed rate charges, Petitioners continue to benefit from the discriminatory rate treatment they received from CMX.

Petitioners and their Amici in order to keep their discriminatory unfiled rate bargains would have this Court find a filed rate unenforceable until found to be reasonable by the Commission. However, this Court has recently held that an administrative agency may not depart from "long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory schemes." *California v. FERC*, 495 U.S. 490 (1990). As noted by the Court in *Maislin*, if "strict adherence" to the filed-rate doctrine (which includes promptly paying a carrier's filed rates) "has become an anachronism in the wake of the MCA [the Motor Carrier Act of 1980], it is the responsibility of Congress to modify or eliminate these sections." 111 L.Ed. 2d at 114.

A debtor who is also a creditor is not automatically entitled to a set-off under 11 U.S.C. Section 553. The bankruptcy code preserves a right of set-off which existed pre-petition but does not create a right of set-off which did not exist before the bankruptcy filing. Amici NITL's attempt to use the bankruptcy code to circumvent the filed-rate doctrine is without merit, as there is no pre-petition debt to set-off since the filed rate has not been paid.

The Fourth Circuit is in accord with the longstanding doctrine that a shipper must pay first and then sue for reparations. Congress has not altered the statutory scheme as interpreted by this Court. The judgment of the lower court must be affirmed.

ARGUMENT

I. THIS COURT'S PRECEDENT ESTABLISHES THAT ANY INTERFERENCE BY A COURT WITH THE COLLECTION OF THE FILED RATE IS PROHIBITED

An unbroken line of Supreme Court opinions establishes the principle that once a rate which is on file with the Commission is effective, a common carrier's filed rate must first be paid before an aggrieved shipper may commence an action for reparations. There is no statutory right, as Petitioners and their supporting Amici urge, for private shippers,[5] to withhold payment of an unambiguous filed rate, while the Commission decides whether the filed rate is unreasonable. This Court has unwaveringly held that deviation from the filed rate is impermissible, with the most recent expression of the inviolability of the filed-rate doctrine stated in *Maislin*.

A. Early Court Decisions Establish The Appropriate Statutory Response To A Rate Reasonableness Defense

The Court first enunciated the appropriate remedy for a shipper aggrieved by imposition of an allegedly unreasonable rate in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), stating:

> . . . it may not be doubted that the power of the [Interstate Commerce] Commission would nevertheless extend to hearing legal complaints of and awarding reparations to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

204 U.S. at 442. *Abilene Cotton* made clear that redress for imposition of an unreasonable rate is through a reparation proceeding.

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[5] *Cf.* Tucker Act, 49 U.S.C. Section 66 (1976) (recodified at 31 U.S.C. Section 3726). ICC Brief at 13, n.7.

The importance placed on paying the filed rate despite the requirement for rates to be reasonable was clarified in *Robinson v. Baltimore & O.R. Co.*, 222 U.S. 560 (1911). The Court expounded upon an earlier decision asserting:

> The act . . . whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they were in effect . . .

222 U.S. at 508.

The *Robinson* Court recognized that enforcement of the reasonable rates mandate of the Act is accomplished only through a reparations proceeding. In contrast, the Act proffers no support for a defense of rate reasonableness rather than payment of the filed rate. *Robinson* declared the Act itself, not the inherent equity of a particular procedure, as the ultimate guide for the manner of enforcement.

Thus, shippers today cannot prescribe a different method of enforcement than the one promulgated by Congress. Subsequent Court holdings clarify this point and support the exclusivity of the reparations procedure. In *Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co.*, 230 U.S. 247 (1913), the rationale for the importance of courts treating a rate as presumptively reasonable until deemed otherwise was explained thusly:

> Under the statute the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission the carrier and shippers are alike bound to treat them as lawful. *After the rate had been abandoned the carrier is still obliged to treat it*

> *as having been lawful*, and cannot refund what had been collected under it *until* the Commission determines that what was apparently reasonable had in fact been unreasonable. But such a determination cannot be made by the courts, for they would not only have first to exercise an administrative function and make a rate by which to measure the reasonableness of the charge collected, but they would have to go further and treat as unreasonable a rate, *past or present*, which the statute had declared should be deemed lawful *until* it had been held to be otherwise by the Commission.

239 U.S. at 259 (emphasis supplied). Therefore, contrary to the position espoused by the Amici supporting Petitioners (ICC Brief at 26; NITL Brief at 15), a court has no authority to even make an initial or *prima facie* determination of reasonableness.[6]

A case decided the same year as *Mitchell Coal*, *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184 (1913), reached similar conclusions.[7] This Court held:

> The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless *bound to pay* and the carrier to retain what had been paid, leaving, however, to the

[6] The Commission argues that courts are to consider, in every case where reasonableness is a defense pled, whether a "threshold showing" of rate unreasonableness has been made to warrant further action by the Commission. *See* ICC Brief at 26. However, to do so courts, as a necessity, would engage in a rate reasonableness inquiry, forbidden by the statute as interpreted by this Court. Such inquiry is forbidden because courts would undoubtedly differ in establishing what a *prima facie* case is thus thwarting uniformity of application of rates.

[7] The gravamen of the plaintiff's complaint was that the Pennsylvania Railroad had paid other shippers rebates of from 10 to 45 cents per ton, while paying plaintiff a rebate of only 10 to 25 cents per ton.

> former the right to apply to the Commission for reparation.

230 U.S. at 197 (emphasis supplied). Accordingly, a shipper must *pay* the filed rates promptly and then seek relief from the Commission. The Court recognized that the rates may be unreasonable, yet possible unreasonableness may not interfere with payment. Here, CCE and Reiter are petitioning the Court to enjoin payment of the filed rate by staying the action because the rate *may* be unreasonable. Petitioners thus request this Court to overturn the holdings in *Mitchell Coal* and *International Coal*. However, this Court has for almost eighty years repeatedly affirmed the pay first approach of *Mitchell Coal* and *International Coal*.

In *Keogh v. Chicago N.W. Ry. Co.*, 260 U.S. 156 (1922) Justice Brandeis writing for the majority stated:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper.

260 U.S. at 163. Therefore, a rate is legal, i.e. collectible until it is found to be unlawful by the Commission.

In *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924), when next confronting this issue, the Court concluded: "The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified." 264 U.S. at 425. Despite this clear instruction, Petitioners and supporting Amici now maintain that filed rates are to be presumed unlawful. However, as made clear in *Louisville & Nashville R.Co. v. Maxwell*, 237 U.S. 94 (1915), this Court has consistently required adherence to the filed tariff until the rate is declared unlawful by the Commission.

A filed rate has always been presumed lawful and collectible until a contrary Commission decision.[8] The de-

[8] The Court in *Maislin* recognized that common carrier filed rates are presumptively reasonable absent a contrary Commission deci-

fense of rate reasonableness turns statutory law and established Supreme Court precedent on its head by declaring a rate unlawful (i.e. uncollectible) before a Commission determination has been made. Such a result cannot exist if the structure of the Act is to be maintained. 49 U.S.C. Section 10708 provides the statutory mechanism should shippers desire to challenge the reasonableness of a proposed rate. Congress allowed the Commission the authority to suspend proposed rates for a *maximum period* of 7 *months*. Neither the Commission nor courts have power to extend this period. *See generally Arrow Transpotration Co. v. Southern Ry. Co.*, 372 U.S. 657 (1963). In an investigation and suspension proceeding, the carrier bears the burden of demonstrating reasonableness. 49 U.S.C. Section 10708(e). Under the Act, this is the only period when a carrier must prove reasonableness *before* collecting the tariff rate. After the rate becomes effective, the statute attaches a completely different legal significance to it. Once effective, the rate becomes presumptively lawful. The Court made this clear in *Square D Co. v. Niagara Frontier Traffic Bureau, Inc.*, 476 U.S. 409 (1986), when it observed:

> In this case, unlike *Keogh*, the [carriers'] rates, established in the tariffs that had been filed with the ICC were not challenged in a formal ICC hearing before they were allowed to go into effect. They were, however, duly submitted, *lawful* rates under the Interstate Commerce Act in the same sense that the rates filed in *Keogh* were lawful.

476 U.S. at 417 (emphasis supplied).

Of course, this is not to say that the filed rate is sacrosanct. It may be challenged under 49 U.S.C. Section 10704 for the future and under Section 11705(b)(2) and (3) for reparations. However, unlike a suspended,

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sion. "The ICC did not determine whether the tariff rates were unreasonable . . . . We therefore must assume, for purposes of our decision today, that the rates were reasonable." 111 L.Ed.2d at 110, n.10.

proposed rate where the carrier must prove reasonableness, an effective rate is presumed reasonable and the shipper now carries the burden of proving unreasonableness. Moreover, the carrier cannot be prevented from collecting its filed rate during a complaint proceeding challenging an effective date. The carrier is required to collect the filed rate "unless and until" that rate is shown to be unreasonable. Hence, the language in *Maxwell* and *Arizona Grocery*.

B. A Stay of Collection of An Unambiguous Filed Rate Is An Inappropriate Procedure

Prompt payment of the filed rate is necessary before commencement of an action at the Commission. The Court in *Lowden v. Simonds—Shields—Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) held that "until changed, tariffs bind both carriers and shippers with the force of law." The allowance of a rate reasonableness defense, as requested by Petitioners has the exact opposite effect. In essence such a procedure declares a rate unreasonable until a Commission decision is rendered. This is in direct conflict with the statutory scheme.

In *Crancer v. Lowden*, 315 U.S. 631 (1941), the Court addressed the "pay first" statutory prerequisite directly. The shippers contended the district court erred in denying their motion to stay proceedings pending action by the Commission. The Court disagreed, concluding:

> The issue of the reasonableness of the rates was *not open* to the District Court. The meaning of the tariff had been determined by the Commission. It remained to the railroad *only to collect* the rates for which the tariff called and for the District Court only to see that the railroad did collect them.

315 U.S. at 635 (emphasis supplied). While the Court's earlier cases had affirmed that the rates were to be enforced until deemed unreasonable by the Commission, *Crancer* made it clear that a court was not required to stay collection in order to wait for the Commission's decision as to reasonableness.

Furthermore, the Court in *Crancer* recognized the shippers "suffered no hardship as a result of the trial court's insistence on proceeding with the trial." 315 U.S. at 636. This does not suggest, as do Petitioners and supporting Amici, that the Court sanctioned any alternative to payment of the filed rate. *See* Petitioners' Brief at 10; NITL Brief at 20; ICC Brief at 21.

Petitioners and their Amici attempt to establish a different standard for insolvent carriers based upon *Crancer*. However, *Crancer* did not state or imply that upon a finding of unreasonableness the shipper would be guaranteed to recover its judgment. In fact, there is nothing in the Act or this Court's decisions which imply a court must first determine if a carrier has the financial ability to pay a reparations award at some undetermined future date.

Indeed, a carrier could make the corresponding argument against a delay in payment of the filed rate.[9] A shipper could also go bankrupt while the Commission determines the reasonableness of the rate. *See* Brief of Amicus American Freight at 4. Furthermore, no remedy exists for a carrier to recover the filed rate from a bankrupt shipper if the Commission ultimately finds the filed rate to be reasonable. The Act requires no investigation into the financial status of the carrier before payment of the transportation charges, and any contention that one exists, for either shipper or carrier, is folly.

C. The Fourth Circuit's Opinion Is Consistent With This Court's Current Posture With Respect To Rate Reasonableness

The current posture of the Court is articulated in *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U.S. 657 (1963) and its progeny culminating in *Burlington N., Inc. v. United States*, 459 U.S. 131 (1982). In *Arrow*,

[9] In fact, the *Maislin Industries* case is still pending before the Commission today despite a record that has been closed for over one year.

this Court held that the power to suspend the application of a filed rate "was entrusted to the Commission only." 372 U.S. at 667.[10] Simply put, a district court has no power to make the assumption that a filed rate is in any way unreasonable. This Court in *Arrow* concluded:

> A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain.

372 U.S. at 669-70.

Furthermore, the Court in *Arrow* stressed the importance of timing, holding that:

> . . . [it] would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive. The more plausible inference is that Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction.

372 U.S. at 668 (emphasis in original).

[10] Professor Sharfman, in his renowned treatise on the early history of the Commission, maintains this view as well. The failure of the Commission to issue an order within a subscribed suspension period meant that the proposed changes became effective although the Commission might continue its investigation and bring it to decision. The purpose of the suspension was presumably to give the shipper extra protection against the imposition of an illegal rate. Sharfman notes that the suspension power was unfair to carriers because the proposed changes in rates, might be found to be justified; and no means was available to the carriers for revenue lost in the interim. In contrast, the shippers could later sue if a rate was found to be unreasonable after the suspension period terminated and they had paid the rate. 1 *Sharfman, The Interstate Commerce Commission* (1931), 202.

In the case presently before this Court the district court's stay and referral order envisions that the Commission will (or could) find CMX's filed rates unreasonable. Therefore, the district court's order clearly relates to the timing of a rate change and is out of harmony with the "uniformity of rate levels" mandated by the Act. A district court has no power to make the assumption that a filed rate is unreasonable.

In three cases subsequent to *Arrow* but prior to *Burlington N.*, this Court has denied the federal court's authority to interfere with rates regulated by the Act. In *Atchison, T.& S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973), the district court enjoined the rates which the Commission had already approved. The Commission's proceeding had been concluded or had been perceived to be concluded by the Commission. The district court maintained that the Commission had failed to adequately explain its reasoning, despite the fact that by law "carriers may put into effect any rate that the Commission has not declared unreasonable." 412 U.S. at 819. This Court reasoned, as it had in *Arrow*, that Congress, by giving the Commission the power to suspend rates, had intended to preclude the courts from doing the same. Any injunctive determination made by the courts intrudes upon what the "doctrine of primary jurisdiction is designed to avoid." 412 U.S. at 821.

The holding in *Arrow* that an injunction would directly interfere with the Commission's decision as to when the rates were to go into effect, gave strength to the decisions in *United States v. SCRAP*, 412 U.S. 669 (1973) and *Consolidated Rail Corp. v. National Assn. of Recycling Indus., Inc.*, 449 U.S. 609 (1981). In *SCRAP* the district court granted an injunction against the filed rate on grounds of noncompliance with NEPA. However, this Court reversed the action of the district court by refusing to enjoin the rate increase. The Court feared an inconsistency would develop if a defense to payment of the applicable filed rate was permitted. 412 U.S. at

696. Any defense to payment of the filed rate would surely create the same inconsistency which concerned the Court in *Arrow*. In reaffirming the reasoning behind payment of the filed rate the Court explained:

> . . . to grant an injunction in the present context, *even though not based upon a substantive consideration of the rates*, would directly interfere with the Commission's decision as to *when* the rates were to go into effect, and would ignore our conclusion in *Arrow*. . . .

412 U.S. at 697 (emphasis in original and supplied). The Court did not regard the Act as providing any defense against payment of the filed rate. Once rates are in effect the *only* power of a court is enforcement. A claim against the rate, whether as violative of NEPA or as unreasonable must be brought before the Commission.

The Court in *SCRAP* expounded upon the importance of timing articulated in *Arrow* stating that:

> The suspension period was limited as to time to prevent excessive harm to the carriers, for the revenues lost during that period could not be recouped from the shippers.

412 U.S. at 697.

A few years later in *Consolidated Rail*, where the Commission fixed rates for recycled material, the Court of Appeals for the District of Columbia Circuit enjoined the effectiveness of new rates until after the Commission's reconsideration. This Court in reversing found "no basis in our prior decisions for the revocation order or for the injunction against further increases." 449 U.S. at 612. The Court further concluded that "the authority to determine when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission." 449 U.S. at 612.

Courts may not interfere with the timing of rate changes by preventing collection of a legal rate, "Con-

gress channeled *all rate decisions* to the Commission in the first instance . . . court-ordered relief interferes with the delicate balance the Act strikes between the competing interests of shipper and carrier. . . ." *Burlington N.*, 459 U.S. at 140 (citations omitted and emphasis supplied). The Court reversed the Court of Appeals' decision that a carrier could not collect new rates that had been filed with the Commission while the Commission had the rates under scrutiny. This Court has repeatedly acknowledged that court-ordered injunctions concerning the collection of effective, filed rates violate the meaning and purpose of the Act. A court cannot use a stay,[11] in lieu of an injunction to allow the shipper a rate reasonableness defense. A stay is an injunction. In order to decide if a stay is warranted a court out of necessity must delve into an impermissible consideration of issues of reasonableness.

In *Maislin*, *supra*, this Court reaffirmed the precedent in *Arizona Grocery*, *supra*, which recognized that the filed rate is the legal rate, however:

> Under [the Act] the shipper was *bound to pay* the legal rate; but if he could show that it was unreasonable he *might* recover reparation.
>
> The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonablness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts.

111 L.Ed. 2d at 110 (citation omitted and emphasis supplied).

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[11] A stay is defined as:

> A suspension of the case or some designated proceedings within it. It is a kind of *injunction* with which the court freezes its proceedings at a particular point.

Black's Law Dictionary 1413 (6th ed. 1990) (emphasis supplied).

After reaffirming the "pay first" rule set forth in *Arizona Grocery*, the Court in *Maislin* refrained from making any judicial pronouncement concerning rate reasonableness, other than to observe that its rejection of unreasonable practices as an exception to the filed-rate doctrine did not foreclose exploring "the issue of the reasonableness of the tariff rates . . . on remand." 111 L.Ed. 2d at 110, n.10. The issue of rate reasonableness simply was not before the Court. Rather, upon exploration, prior Court precedent mandates that the obligation to pay the filed rate is a prerequisite to litigating the rate reasonableness issue. Certainly, this Court was not overruling *Arizona Grocery* in footnote 10 of *Maislin*, when it cited that case with approval in the text of the decision.

D. *Western Pacific* Provides No Support For Petitioners' Request—Rather It Confirms That Petitioners Must Pay First

Reliance by Petitioners and supporting Amici on *Western Pacific*, *supra*, is misplaced for a variety of reasons. Foremost among these is that the Tucker Act[12] specifically allows the United States a "unique right" to withhold payment of its freight bills, a right not allowed to private litigants. *See* ICC Brief at 13, n.7. The Government in *Western Pacific* applied alleged overpayments that it had already made against current billings. When the carrier sued for the payments, claiming there was no overpayment, the Government defended on rate applicability grounds. The inquiry into reasonableness was limited to determining which of two filed rates applied.[13]

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[12] 49 U.S.C. Section 66 (1976) (recodified at 31 U.S.C. Section 3726).

[13] Even if the inquiry in *Western Pacific* was limited solely to rate reasonableness, since the United States Government has the right to set off claims and not pay carriers filed rates, it could raise rate reasonableness as a defense to a subsequent carrier suit for collection of the filed rate charges. Such is simply not true for private shipping litigants. If it were true then Congress would not have had to pass the Tucker Act to give the United States Government its "unique right" to set off.

The Court in *Western Pacific* noted "We hold, therefore, that the limitations of Section 16(3) [now Section 11706(c)] does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's primary jurisdiction, as were these questions relating to the applicable tariff." 350 U.S. at 74.

In the instant case, the government is not the shipper nor is there a choice between two "filed rates" so that it could be argued that a defense exists within the primary jurisdiction of the Commission. Instead, Petitioners are merely attempting to raise a reparations claim without first paying CMX's filed tariff charges.[14] Therefore Petitioners can not base a reasonableness defense on *Western Pacific*.

II. THE DOCTRINE OF PRIMARY JURISDICTION AND ALL BUT RECENT OPINIONS OF THE INTERSTATE COMMERCE COMMISSION SUPPORT A PAY FIRST APPROACH

A. The Doctrine Of Primary Jurisdiction Is Misapplied By Petitioners

The doctrine of primary jurisdiction prohibits courts from entering into areas which Congress has delegated to the Commission. Contrary to Petitioners' and their Amici's assertions, requiring payment of the filed rate does not infringe upon the Commission's primary jurisdiction.

The Court has long held that the issue of rate reasonableness requires "preliminary resort to the Commission." *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). However, if a court stays a proceeding and refers it to the Commission without compelling payment

[14] Similarly, Amici's reliance on *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202 (1960) is misplaced because that case also involved the United States as the shipper and was governed by the Tucker Act. ICC Brief at 13; NITL Brief at 17-18.

of the filed rate, then the court is making a preliminary determination of unreasonableness. The Ninth Circuit's instruction to the lower court in *Milne Truck Lines, Inc. v. Makita U.S.A., Inc.*, —— F.2d ——, No. 91-55059, 1992 WL 152140 (9th Cir. July 7, 1992) demonstrated this intrusion into the Commission's jurisdiction:

> The district court need not refer the issue of reasonableness to the ICC if there is no reasonable liklihood that the ICC will reach a determination favorable to the shipper.

—— F.2d ——, 1992 WL at *6. Likewise, the First Circuit in, *Delta Traffic Service v. Transtop Inc.*, 902 F.2d 101, 106 (1st Cir.), *withdrawn in part*, 1990 U.S. App. Lexis 13339 (1st Cir. 1990), also sanctioned court interference into reasonableness determinations and maintained: "In our view, these facts, taken together, show a sufficient possibility of an 'unreasonableness' determination to warrant referral." 902 F.2d at 106. Thus, in a rate-referral without payment scenario a court would be directly interfering with the Commission's primary jurisdiction. The referring circuits referenced by Petitioners and Amici are thus in conflict with this Court's holdings in *Arrow*, *SCRAP* and *Burlington N.*[15]

The Court specifically addressed the issue of abeyance and primary jurisdiction in *Far East Conference v. United States*, 342 U.S. 570 (1951), asserting that:

> . . . no purpose will be here served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate.

342 U.S. at 577. The Court also stated "in cases raising issues of fact not within the conventional experience of

[15] *See* Petitioners' Brief at 13-14; ICC Brief at 14-15; NITL Brief at 19, n.11.

judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." 342 U.S. at 574. The Court recognized the separation of judicial and administrative actions and refused to stay the proceeding. A court cannot intrude upon the primary jurisdiction of the Commission by making a preliminary determination as to reasonableness. Thus, the Court in *Far East* considered holding an action in abeyance, like the stay requested by Petitioners, an interference with the primary jurisdiction of the Commission.

Amicus NITL misapplies the holding in *Far East Conference*, *supra*, by equating it with a rate reasonableness defense. NITL Brief at 15. The Court in *Far East* was merely distinguishing the role of the courts from the role of administrative agencies. In the present case the Fourth Circuit followed the holding in *Far East* by enforcing payment of the filed rate and allowing the Commission to determine reasonableness. A court is not required to first consider whether a shipper will be able to obtain a complete remedy when carrying out the provisions of the Act, nor does the Commission offer any case law to support such a notion.

B. The Commission's Decisions And Reports Have Historically Supported Payment Of The Filed Rate And A Later Suit For Reparations

Recent Commission determinations do not correspond with the position adopted by the Commission for the past 100 years. The Commission as recently as 1984 intervened in a Fifth Circuit Court of Appeals case to stress the importance of the pay first approach. The court in *Southern Pac. Transp. Co. v. San Antonio Texas*, 748 F.2d 266 (5th Cir. 1984), followed this Court's precedent in regard to primary jurisdiction stating "where the reasonableness of a rate is at issue, 'there must be a preliminary resort to the Commission'." 748 F.2d at 273. Both Petitioners and Respondents support this position,

however, the two diverge on the issue of whether a shipper can await the Commission's decision before paying the rate. The Fifth Circuit maintained:

> In the present case, forcing San Antonio to pay the filed rate immediately would not interfere with the ICC's primary jurisdiction to determine reasonableness. The fact that the rate has already been paid does not change the Commission's inquiry. The I.C.C. scrutinizes the same rate terms (as interpreted by the District Court) whether or not payment has been made.

748 F.2d at 273. The Court concluded:

> In sum, the primary jurisdiction of the ICC would not be impaired by immediate execution of the judgment for the railroad.

748 F.2d at 273.

The Fifth Circuit in *Southern Pac.* noted "that the Commission agrees with our conclusion. *See* Brief of Intervenor at 12." 748 F.2d at 273 n.14. Appendix B hereto at 17a. In its brief at the Fifth Circuit, the Commission shared the fear expressed in *Burlington N.* that a reasonableness defense would establish "an incentive for shippers to file complaints with the Commission, while withholding payment of the tariff rates, in hopes that the federal courts would sanction such violations of the filed-rate doctrine." Brief of Intervenor at 15 Appendix B at 19a-20a. The Commission also expressed its unequivocal support for adherence to the pay first approach by citing *Davis v. Portland Seed Co.*, *supra*, and *Pennsylvania R.R.Co. v. International Coal Mining Co.*, *supra*. Brief of Intervenor at 14, Appendix B at 19a. The Commission, in its Brief here, ignores *Davis* and *Southern Pacific* and places a "revisionist" gloss on *International Coal*.

The Commission also ignores a long line of early Commission cases which identify reparations as the sole remedy for past unreasonable rates. *See Perry v. Florida Central & Peninsular R. Co.*, 3 I.C.C. 740, 745 (1891);

Cattle Raisers' Assoc. v. C.B.Q.R. Co., 10 I.C.C. 83, 97 (1904) ("has the party seeking recovery paid the filed rate"); *Sloss-Sheffield Steel & Iron Co. v. L. & N. R.R. Co.*, 51 I.C.C. 635, 641 (1918) ("rates are binding as the lawful rates until overturned or modified after they have been ascertained upon full hearing and investigation to be unreasonable"); *Anadarko Cotton Oil Co. v. A.T. & A.T. & S.F. Ry. Co.*, 20 I.C.C. 43, 49 (1910).

For almost one hundred years the Commission would not even consider a claim that a carrier's rates were unreasonable without proof of payment of the rate by the shipper. The Commission's unprecedented reversal on this issue can only be understood as another misguided attempt to rewrite the Act with regard to bankrupt carriers due to the plethora of pending undercharge actions.[16] Of course, Congress did not alter the statute upon which the Commission's century long interpretation was based, therefore, the Commission cannot find any legislative basis for its new view of the reparations remedy.

C. The Commission's Statutory Interpretation Must Be Rejected In The Same Fashion As The Court Rejected Its *Negotiated Rates* Policy In *Maislin*.

The Commission concedes that this Court in *Maislin* struck down its *Negotiated Rates* policy statement because that policy rested upon an interpretation of the Act that is "contrary to the language and structure as a whole, and the requirements that make up the filed-rate doctrine in particular." ICC Brief at 4, citing 110

[16] As this Court is aware, since before the 1986 *Negotiated Rates* policy statement, the Commission has done an "about face" with regard to its enforcement of the filed-rate doctrine. The Commission's continued bias against the public tariff system in general and the filed-rate doctrine in particular is reflected in the Commission's Rate decision in *Petitions for Issuance of Rate Reasonableness and Unreasonableness Practices Policy Statement*, 8 I.C.C. 2d 61 (1991) and views of the Commission's Chairman Edward J. Philbin. *See* Brief of Amicus Leonard L. Gumport at 21-23.

S.Ct. at 2768. Yet, in seeking to carve out an insolvency rule for the filed-rate doctrine, the Commission asserts a position which is in effect an end run around *Maislin*. The purpose is clearly to forestall trustees in bankruptcy from timely liquidating estates, while the Commission lobbies Congress to provide a legislative remedy.[17]

The Commission would have this Court adopt a rule which would foreclose *any* collection of filed rate charges from any shipper who claims rate reasonableness as a defense until such time, if at all, that the Commission has passed on the reasonableness of the carrier's filed rate. The Commission claims that the primary purpose of the filed-rate doctrine is "to prevent rate discrimination accomplished through published rebates." ICC Brief at 6. It further believes the purpose of the filed-rate doctrine is no longer served by forcing shippers to pay filed rate charges to a liquidating carrier before a reasonableness determination is made because "there is no possibility of a defunct carrier unlawfully discriminating for or against any shippers while the rate reasonableness challenge is being resolved." ICC Brief at 6, citing 8 I.C.C. 2d at 68. Besides anti-discrimination, another purpose of the filed-rate doctrine, according to the Government, is to insure "prompt collection of charges" in order to maintain "a stable transportation system." ICC Brief at 6. However, the Commission asserts that economic stability is no longer necessary when the carrier is no longer operating. ICC Brief at 6.

In other words, the Commission says that while a motor carrier was operating, it was required to charge and shippers were bound to pay filed rates without regard to their reasonableness. However, because of the Commission's failure to enforce the filed rate during the

[17] The Commission informs the Court that the Commission has already pending before it some 200 cases involving rate reasonableness filed since *Maislin*. Noteworthy, no reasonableness decisions have been rendered by the Agency.

1980's, carriers failed to abide by this strict statutory requirement. The prompt payment of filed rates, of course, never occurred and there has been financial instability throughout the industry due to cutthroat competition. *See* Brief of Amici International Brotherhood of Teamsters at 2; Leonard L. Gumport at 2-4; Lloyd T. Whitaker at 3. During the 1980's carriers, while active, ignored the filed-rate doctrine, in part encouraged by the lack of enforcement by the Commission. Now, ironically, the Commission instructs this Court to continue to ignore the filed-rate doctrine and the purposes of the Act because in the Commission's view, the damage has already been done. It is the same convoluted logic that this Court rejected in *Maislin*.

In *Maislin*, the Commission argued that "in light of the more competitive environment, strict adherence to the filed-rate doctrine is 'inappropriate and unnecessary to deter discrimination today.'" 111 L.Ed. 2d at 113, citing Negotiated Rates I, 3 I.C.C. 2d at 106. This Court noted that, "according to the Commission, 'the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between shippers.'" 111 L.Ed. 2d at 113.

The Court, however, found such a characterization unconvincing because even if the filed-rate doctrine is an "anachronism" in the wake of the Motor Carrier Act of 1980, "it is the responsibility of Congress to modify or eliminate these sections" and not the ICC. 111 L.Ed. 2d at 114.

The Commission refuses to understand the lesson of *Maislin* that administrative policy may not trump a congressional mandate. The filed-rate doctrine as codified at 49 U.S.C. Section 10761(a) mandates that carriers and shippers conduct their business pursuant to filed tariffs *at all times*. Shippers are deemed to know the filed rates of a common carrier. As noted by the Commission, "The filed-rate doctrine requires carriers to 'collect, and shippers to pay, the rates contained in the filed ICC tariffs.'" ICC Brief at 16. Under the filed-rate doctrine, "It is not a defense that the shipper was ignorant of the rate, that the carrier misquoted it, or that the parties agreed to a different rate." ICC Brief at 16, citing *Maislin; Maxwell, supra; Keogh, supra*. Since shippers are presumed to know the rate, they may not claim, under the law, that they did not have every opportunity to seek reparations while the carrier was alive and well. Thus, the Commission's equitable arguments ring hollow when it claims that the requirement of paying an undercharge bill denies shippers a meaningful remedy to seek reparations. As noted by this Court in *Maislin*, even if the equities of the situation were relevant, it is "difficult to see how the equities favored the shipper." 111 L.Ed. 2d at 112, n.12. The shippers could require "proof" of filing or use "watching services" who can determine filed rates with "up-to-the-minute details of a carrier's rate schedule." 111 L.Ed. 2d at 112, n.12.[18]

III. A RATE REASONABLENESS DEFENSE IS NOT ESTABLISHED THROUGH THE LEGISLATIVE HISTORY OF THE INTERSTATE COMMERCE ACT, THE HOLDING IN *T.I.M.E.* NOR SUBSEQUENT LEGISLATION WHICH GAVE SHIPPERS THE RIGHT TO SUE FOR REPARATIONS

The legislative history of the Act provides no support for a rate reasonableness defense. The courts originally had jurisdiction over both applicable rates and the reasonableness of rates. However, the Act was amended by the

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[18] In this case, Petitioners, as Commission regulated brokers, are experienced users of the transportation system. For example, pursuant to the Commission's brokerage regulations, 49 C.F.R. Section 1045.10, Petitioners are duty bound to abide by the Act and Commission regulations regarding the payment of carrier charges. Brokers must refrain from misrepresentation, Section 1045.7, and may not engage in rebating, Section 1045.9.

Hepburn Act,[19] to extend the Commission's primary jurisdiction over reasonableness of rates. The Commission, upon complaint and after full hearing was empowered not only to condemn the existing rates (including regulations and practices affecting such rates) as unjust or unreasonable, but also to determine and prescribe just and reasonable rates for the future.[20] Congress delegated this function to the Commission because the courts could not properly adjudicate a reasonableness action.

Until 1965 shippers had no statutory right to even seek reparations from motor common carriers for unreasonably high rates. Although Congress in 1965 amended the Act to give motor carrier shippers a right to seek reparations, this right is limited to seeking reparations and cannot be used defensively.

Prior to 1959 the Commission had set up a procedure whereby shippers, such as Petitioners here, could petition the Commission for an order waiving undercharges. *See Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337 (1944). This procedure was challenged in *T.I.M.E.*, *supra*.[21]

Relying on *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), this Court reversed, holding that the Act did not "give shippers a statutory cause of action for the recovery of alleg-

[19] Interstate Commerce Act, Pub. L. No. 12987, Chap. 3591, Sec. 4, § 15, 34 Stat. 584, 589 (1906).

[20] 1 *Sharfman* at 45.

[21] In *T.I.M.E.*, several motor common carriers had sued the United States, as shipper, to collect freight charges. The government defended on the grounds that the rates upon which the carriers relied were unjust and unreasonable. The district court granted summary judgment to the carriers, but the Court of Appeals reversed on the ground that the Government was entitled to a Commission determination of the reasonableness of the tariff rates, notwithstanding the Commission's inability to award reparations on motor carrier rates for past shipments.

edly unreasonable past rates, or to enable them to assert 'unreasonableness' as a defense in carrier suits to recover applicable tariff rates." 359 U.S. at 470.

As here, it was asserted in *T.I.M.E.* that a statutory cause of action or defense existed by the virtue of the language in 216(b) of the Motor Carrier Act (the predecessor to present section 10701(a)) requiring that a carrier's rates and practices be reasonable. The Court in *T.I.M.E.* held that the statutory duty to establish and observe reasonable rates and practices creates only a "criterion for administrative application in determining a lawful rate" rather than a "justiciable legal right." 359 U.S. at 469. Then, as now, Section 10701(a) imposes upon common carriers a duty to maintain reasonable rates but provides shippers no defense for a violation of that duty.

The Court further explained that:

> The very provisions of Part I, and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act.

359 U.S. at 470. Likewise, Section 11705(b)(3) conspicuously leaves out any defense to payment of the filed rate.

This Court in *T.I.M.E.* also addressed the contention that the Motor Carrier Act preserved a pre-existing common law right to a reasonable rate. Relying on *Abilene Cotton*, *supra*, the Court concluded that under the statutory scheme only the Commission could determine the reasonableness of a rate and therefore any common law right was necessarily extinguished as absolutely inconsistent with the statute. 359 U.S. at 473. The government had urged that such a remedy would be consistent with the statute when coupled with referral to the Commission for a determination of the reasonableness issue

as an adjunct to a judicial proceeding. The Court rejected this contention stating;

> To permit a utilization of the procedure here sought by the government would be to engage in the very 'improvisation' against which this Court cautioned in *Montana-Dakota*, supra, in order to permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly.

359 U.S. at 475.

The holding in *T.I.M.E.* left purchasers of motor common carrier services without any remedy whatsoever with respect to unreasonable rates imposed on past shipments.

However, in 1965 the 89th Congress created a reparation remedy for the failure of a motor carrier to maintain just and reasonable rates. Pub. L. 89-170, 79 Stat. 651, amended Section 204(a) of the Motor Carrier Act to provide a cause of action against motor carriers for recovery of "reparations" defined as "damages resulting from charges for transportation services to the extent that the Commission upon complaint made as provided in section 216(e) of this part . . . finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." 49 U.S.C. Section 304(a)(5) (1965).[22]

The legislative history indicates that Congress's response to *T.I.M.E.* was limited to providing a reparations remedy for motor carrier shippers. Section 204(a) of the Act did not disturb the holding in *T.I.M.E.* except to

[22] The Interstate Commerce Act was recodified in 1978. *See* Pub. L. 95-473, 92 Stat. 1337, October 17, 1978. The revisions effected no substantive change. The pertinent provisions of former Section 204(a), 49 U.S.C. Section 304(a), now appear in 49 U.S.C. 11705 (b)(3) and 11706(c)(2). Examination of the prior language is required to determine the intent of Congress. *Trailer Marine Transport Corp. v. Federal Maritime Commission*, 602 F.2d 379, at 383 n. 18 (D.C. Cir. 1979).

allow the commencement of a reparations action for damages. *See United States v. Assoc. Transport, Inc.*, 505 F.2d 366 (D.C. Cir. 1974); H.R. Rep. No. 253, 89th Cong 1st Sess., reprinted in 1965 U.S. Code Cong. & Admin News at 708, 712 states:

> The sections would amend Parts II and IV of the Interstate Commerce Act, applicable to motor carriers and freight forwarders, respectively, so as to permit shippers to recover reparations up to two years after the cause of action arises.

S. Rep. No. 387, 89th Cong., 1st Sess. reprinted in 1965 U.S. Code Cong. & Admin. News at 2923 is even more specific:

> In granting a right of action to shippers to recover reparations, the Committee intends those seeking reparations must file a court complaint before seeking the Commission's administrative determination.

The language of the 1965 law is very specific in providing a remedy only where a shipper has paid the carrier's filed rates and commences an action at law to recover reparations. That has not been done by Petitioners here. The narrow reparations remedy cannot be read, in light of *T.I.M.E.*, as providing private shippers with a defense to an action to collect tariff charges.[23]

T.I.M.E. squarely stands for the proposition that while the Act requires rates to be reasonable, it does not provide a shipper a defense against a motor carrier for violation of that duty. The exception Congress enacted relates merely to reparations. Before a shipper can challenge the reasonableness of a carrier's rate it must first

[23] While *T.I.M.E.* involved the U.S. Government as a shipper, despite the Tucker Act, the Government could not raise unreasonable as a defense because there was no affirmative right to recover reparations from motor carreirs. The 1965 Amendment restored the Government's and private shippers' right to recover damages for unreasonable rates, and thus because of the Tucker Act, also restored thhe Government's "unique" right to raise unreasonableness as a defense.

pay and then commence an action at law. If Congress intended to create a rate reasonableness defense it would have been articulated in the statute. *Cf.* Tucker Act, *supra*. Justice Scalia's concurring opinion in *Maislin* articulated this same point when he was discussing the Act juxtaposed with the Commission's deregulation argument:

> . . . while this plainly reflects an intent to deregulate, it reflects an intent to deregulate *within the framework of the existing statutory scheme*. Perhaps deregulation cannot efficiently be accomplished within that framework, but that is Congress' choice and not the Commission's or ours.

111 L.Ed. 2d at 116 (emphasis original).

When Congress recodified 49 U.S.C. Section 304(a)(5) in 1978, the word damages was substituted for reparations.[24] Both of these words convey that one cannot be damaged or awarded reparations unless one has been injured in the first place. If a shipper has not yet paid the filed rate, then pursuant to the Act no injury has occurred.

Congress could have amended the Act to allow a private shipper the right to withhold payment until a determination as to reasonableness was made or required a shipper to make a threshhold showing of unreasonableness in order to delay payment. The fact that Congress did not include these or comparable provisions such as are contained in the Tucker Act is confirmation that for private shippers a defense of rate reasonableness as an exception to payment of the filed rate does not exist.

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[24] Reparations is defined as: "Payment for an injuiry or damage; redress for a wrong done." *Black's Law Dictionary*, 1298 (6th ed. 1990). While damages, the word appearing in 49 U.S.C. Section 11705(b)(3), is defined as:

> A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.

Black's Law Dictionary, 389 (6th ed. 1990).

IV. PETITIONERS CANNOT SEEK SANCTUARY IN THE BANKRUPTCY CODE OR CMX'S BANKRUPT CARRIER STATUS

A. The Bankruptcy Code Does Not Give A Shipper An Absolute Right To Set-Off A Claim Of Rate Reasonableness Against A Carrier's Claim For Collection Of The Filed Rate

11 U.S.C. Section 553 of the Bankruptcy Code gives broad, equitable discretion to bankruptcy courts to recognize set-off rights meeting the two criteria of the statute, i.e. mutuality of the obligations and pre-petition origins of both claims. However, 11 U.S.C. Section 553 does not state that a creditor who is also a debtor is automatically entitled to raise the defense of recoupment against *any* claim by the estate. The issue of mutual debts was discussed in *In Re Verco Industries*, 10 B.R. 347 (Bankr. 9th Cir. 1981), *rev'd on other grounds*, 704 F.2d 1134 (9th Cir. 1983). The bankruptcy court explained, "Section 553 of the Code permits a set-off of mutual debts that arose before the commencement of the case. 11 U.S.C. Section 553(a). Here we can find no mutual debt." 10 B.R. at 352. The same would be true for a shipper and carrier, since a carrier had no debt to the shipper because the shipper had not paid the filed rate. Therefore, the set-off should not be permitted by the Court.

Moreover, in *Riggs v. Government Emp. Financial Group*, 623 F.2d 68 (9th Cir. 1980), citing section 108(a) of the Bankruptcy Act:

> In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. 11 U.S.C. Section 108(a) (1976) (superseded 1978),

the court explained:

> Despite the seemingly mandatory language of this provision, it is well settled that allowance of a set-off lies within the sound discretion of the trial court.

663 F.2d at 73. Any claim by the Amici to a mandatory set-off is inaccurate. *See* NITL Brief at 28-29.

Under the Act "a carrier may not charge or receive different compensation for that transportation or service than the rate specified in the tariff." 49 U.S.C. Section 10761. A set-off would be the equivalent of accepting a lower rate than specified in the tariff. Thus, the NITL Amici favor abandoning the statutory scheme and allowing a carrier to accept less than the filed rate.

Since the inception of the Motor Carrier Act of 1935, the Commission has held that a motor common carrier may not lawfully delay or postpone the collection of its filed rate simply because a shipper has filed a loss and damage claim with the motor carrier: the carrier must collect its lawfully established charges; and any claim for damages to the freight is a matter "entirely distinct from the collection of established charges for transportation and do[es] not in any way relieve the carrier from such duty to collect such charges." *ICC Administrative Ruling No. 65, August 3, 1937.*[25] Even as early as 1909 the Commission explained that the entry of an order based upon a set-off could only occur after the adjudication of the claim of the railroad company against the shipper. *Laning-Harris Coal & Grain Co. v. St.L. & S.F.R. Co.*, 15 I.C.C. 37, 38 (1909). Thereby, the Commission confirmed that a court must first compel the shipper to pay the filed rate (adjudicate the claim of the railroad against the shipper) before any consideration of a set-off.

Forty years later, the Commission reaffirmed the continued viability of its prior prohibition in *Administrative Ruling No. 65* against set-offs, but suggested under certain conditions courts may have discretion to permit set-offs of loss and damage claims. *ICC Administrative Ruling No. 128, March 9, 1978.* Nevertheless, the Commis-

[25] 2A Fed. Carr. Rptr. (CCH) para. 25,065.

[26] 2A Fed. Carr. Rptr. (CCH) para. 25,178.

sion has never held that courts can permit set-offs for failure to pay the filed rate.

In 1988, the Commission once again stated that "shippers are obligated to pay first. Set-offs of freight charges are not lawful." *Regulations for Payment of Rates and Charges—Penalty Charges—For Non-Payment*, Ex Parte No. MC-1, 4 I.C.C. 2d 340 (1988). Petitioners are correct that bankruptcy law allows set-offs under 11 U.S.C. Section 553 in many circumstances. However, under 49 U.S.C. Section 10761 and as promulgated by the Commission set-offs are not permitted. The Commission recognized the discrimination which would result if certain shippers were excused from paying the filed rate because they had a loss and damage or reasonableness claim against a carrier, while other shippers who had paid the filed rate, but had no such claim, were required to file an action for reparations.

The contention that an entity which is both a debtor and a creditor is not required to pay first is completely erroneous. In *Baker v. Gold Seal*, 417 U.S. 467 (1973), this Court disallowed a freight damage claim to be set-off against transportation charges even though the freight claim had been made the subject of a separate counterclaim and reduced to judgment. Indeed, the Court recognized that any shippers who paid the tariff rate would be discriminated against because they chose to abide by the law and not attempt a set-off. Additionally, all the other creditors of the estate would receive less merely because the shipper had a prior claim against the estate. This Court concluded:

> The allowance or disallowance of set-off may seem but a minor part of the architectural problem. But to the extent that it is allowed, it grants a preference to the claim of one creditor over the others by the happenstance that it owes freight charges that the others do not.

417 U.S. at 474.

Despite the views of the shippers, bankruptcy law does not support allowing the set-off to be used as a defense in all actions. A Third Circuit case, *In re Penn Cent. Transp.. Co.*, 477 F.2d 841 (3rd Cir.), *aff'd sub. nom. United States Steel Corp. v. Trustee of Penn. Cent. Transp. Co.*, 414 U.S. 885 (1973), involved a set-off of a loss and damage claim against collection of freight charges. The opinion distinguished a prior holding of this Court, *Chicago & N.W. R.R. v. Lindell*, 281 U.S. 14 (1930), which promoted set-offs as a method of preserving judicial economy. The Third Circuit explained: "Thus, a set-off for damages incurred in shipment is not considered a defense since the potential for effecting a preference under such a guide seems manifest." 477 F.2d at 844.

A set-off which may be a useful tool in preventing unnecessary litigation is not suited for undercharge actions. It is anarchy to award a set-off to a creditor who may not have a valid claim. If the Commission later determines the rate which was set-off to be reasonable, the trustee must await collection of the debt originally sought. Therefore, all the other creditors to the estate, with valid claims, must await payment from a creditor/debtor who did not have a valid claim. The shipper must pay the filed rate, await a Commission determination and then stand in line with the rest of the unsecured creditors of the estate. This procedure leaves the shipper in no different position than a shipper who paid the rate and is then asserting the rate is unreasonable. A shipper who has negotiated a lower unfiled rate receives no special treatment in the Act and should receive no special treatment under bankruptcy law.

B. The Interstate Commerce Act Does Not Differentiate Between A Bankrupt Carrier And A Viable Carrier, Both Are Required To Collect The Rate On File At The Commission

The Act does not differentiate between a bankrupt carrier and a viable carrier, and Petitioners' effort to

make a distinction is without merit. Furthermore, an attempt to establish one procedure for bankrupt carriers and another for viable carriers amounts to punishing the carrier who can no longer afford to operate. The carrier who manages to barely avoid bankruptcy can recover the filed rate without litigating its reasonableness, yet another carrier unable to continue operating is punished severely for its financial position.

Moreover, Petitioners claim that a delay in payment will not harm the bankrupt carrier because it does not have to meet the daily needs of operation. Contrary to that opinion, bankrupt carriers are badly in need of funds to pay creditors, many of whom are former employees. These former employees may be awaiting both medical and pension benefits, while the Commission ponders the reasonableness of a rate. The need for prompt payment of the filed rate may actually be more vital to the bankrupt carrier than to the operating carrier. *See* Brief of Amicus Leonard L. Gumport at 11-12. Under 11 U.S.C. Section 704(1),

> The trustee shall collect and reduce to money the property of the estate for which such trustee serves and close such estate as expeditiously as it is compatible with the best interest of the parties in interest.

Therefore, a trustee, by law, must compel the shipper to pay the filed rate and compensate the creditors of the estate as soon as possible.

The fact that the carrier billed and collected a rate other than the filed rate does not render the filed-rate doctrine meaningless. Indeed, the Court in *Maislin*, *supra*, maintained "we have never held that a carrier's unreasonable practice justifies departure from the filed-rate doctrine." 111 L.Ed. at 110. *Maislin* dismissed any attempt by a shipper to find a defense in a situation where a shipper was previously billed a negotiated rate.

The Court can not merely defer to the Commission's choice of the appropriate means of enforcing the statute and presume that produces an equitable conclusion, as suggested by Petitioners and their Amici. Petitioners' Brief at 20; ICC Brief at 5-7; NITL Brief at 22; American Freight at 4. The Commission as noted earlier, alters its policy in regard to certain situations and it cannot be counted on to act lawfully. For example, the Commission's *Negotiated Rates* policy statement permitted a shipper to rely on negotiated unfiled rates. This Court rejected that policy statement in *Maislin* and reproached the Commission for adopting policies "inconsistent with the statutory scheme as a whole." 111 L.Ed. at 111. Thus, any reliance on policies promulgated by the Commission must not lead the Court astray from the meaning and purpose of the Interstate Commerce Act.

CONCLUSION

Section 10761(a), the filed-rate doctrine, is, from a statutory and *stare decisis* standpoint, a crucial element of our National Transportation Policy. As stated by this Court in *Maislin*, the filed-rate doctrine is "utterly central" to the Act. It enables shippers and carriers to move freight at specific rates in a fashion that not only gives notice to all but forms the foundation of our transportation policy, anti-discrimination. The Fourth Circuit recognized the pre-eminence of that statutory provision and this Court should affirm the Court of Appeals decision.

Respectfully submitted,

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September 2, 1992

APPENDICES

APPENDIX A

[Service Date Mar. 16, 1990]

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-164423 (Sub 3-RIR)

CALIFORNIA CONSOLIDATED ENTERPRISES, INC.
WILMINGTON NC

REVOCATION OF AUTHORITY
MC-164423

The above carrier holds authority as a contract carrier authorizing it to engage in transportation by motor vehicle, in interstate or foreign commerce, and has failed to comply with Section 10927 of the Interstate Commerce Act and 49 CFR 1043 of the Commission's regulations, governing the filing of evidence of bodily injury and property damage insurance or other security for the protection of the public.

It is ordered:

Under Section 11701(a) of the Act, we hereby open an investigation to decide whether, in accordance with Section 10925 of the Act, the operating rights should be revoked due to the carrier's noncompliance with the Act and with the Commission's regulations.

The carrier must file with the Commission a written statement under oath, within 60 days after this decision is served, showing good cause why its operating rights should not be revoked. A copy of this decision will be filed in Docket No. MC-164423 and all subs thereunder.

Any questions regarding the aciton taken by the Revocation Board should be directed to Alice K. Ramsay,

Chief, Insurance Branch, telephone (202) 275-0054 or (202) 279-7511.

Decided: March 2, 1990

By the Commission, Revocation Board, Members Gaillard, Love, Hardy.

/s/ Noreta R. McGee
NORETA R. MCGEE
Secretary

[SEAL]

[Service Date May 23, 1990]

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-164423 (Sub 3-RIR)

CALIFORNIA CONSOLIDATED ENTERPRISES, INC.
WILMINGTON NC

REVOCATION OF AUTHORITY

MC-164423

By decision of the Commission, Revocation Board, entered March 2, 1990, we notified the carrier that we have opened an investigation under 49 U.S.C. 11701(a) to determine whether its operating rights as a contract carrier of property by motor vehicle should be revoked for noncompliance with our insurance regulations, with respect to bodily injury and property damage coverage.

In that decision, we ordered the carrier to file a statement within 60 days showing good cause why its operating rights should not be revoked, or establishing compliance. The carrier has failed to comply with the terms of that decision and is not in full compliance with the requirements of 49 U.S.C. 10927 and 49 CFR 1043.

It is ordered:

The carrier must file with the Commission within 60 days after this decision is served, a written statement under oath, (a) showing good cause why its operating rights should not be revoked or (b) establishing that it is in full compliance with the Act and the Commission's regulations.

The carrier is notified that failure to respond or comply with the terms of this decision shall, without further

order, result in revocation of its operating rights effective 60 days after the date this decision is served.

A copy of this decision will be filed in Docket No. MC-164423 and all subs thereunder.

Decided: May 16, 1990

By the Commission, Revocation Board, Members Gaillard, Love, Hardy.

/s/ Noreta R. McGee
NORETA R. MCGEE
Secretary

[SEAL]

[Service Date Jun 20, 1990]

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-164423 (Sub 3-RIR)

CALIFORNIA CONSOLIDATED ENTERPRISES, INC.
WILMINGTON NC

REVOCATION OF AUTHORITY

MC-164423

By decision of the Commission, Revocation Board, entered March 2, 1990, an investigation under Section 11701(a) of the Act was instituted to decide whether in accordance with Section 10925 of the Act, the operating rights specified above should be revoked for failure by the carrier to comply with the requirements of Section 10927 of the Act and 49 CFR 1043 of the Commission's regulations, governing the filing of evidence of insurance or other security for the protection of the public.

On May 16, 1990, a second decision was entered ordering compliance with those requirements or the authority would be revoked.

Subsequently, the Board has been notified that the carrier has requested revocation voluntarily of its operating authority pursuant to Section 10925(b) of the Act.

It is ordered:

The decision entered May 16, 1990, is vacated and set aside, and the proceeding instituted under Section 11701 (a) is discontinued.

It is further ordered:

The authority specified above is revoked effective the date of service of this decision.

Decided: June 13, 1990

By the Commission, Revocation Board, Members Love, Hardy.

/s/ Noreta R. McGee
NORETA R. MCGEE
Secretary

[SEAL]

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Civil Action No. 84-1059

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *et al.*,
Plaintiffs, Appellants,
and Cross-Appellees

vs.

SAN ANTONIO, TEXAS, ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD,
Defendant, Appellee,
and Cross-Appellant

On Cross Appeals from the United States District Court
for the Western District of Texas, San Antonio Division

BRIEF OF INTERVENOR INTERSTATE COMMERCE COMMISSION

JOHN BROADLEY
General Counsel

ELLEN D. HANSON
Associate General Counsel

TIMM L. ABENDROTH
Attorney
Interstate Commerce
Commission
Washington, D.C. 20423

MARCH 1984

STATEMENT OF JURISDICTION

The Court has jurisdiction to review the district court's decision under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES [1]

1. Whether the district court erred in granting summary judgment for the railroads on their claim for underpayment of freight changes without referring a question of rate applicability to the Interstate Commerce Commission?

2. Whether the district court erred in staying execution of its judgment pending a decision by the Commission on the reasonableness of rates.

STATEMENT OF THE CASE

This action was begun by the appellant railroads, Southern Pacific Transportation Company and Burlington Northern Railroad Company, in February 1981, to collect approximately $19 million in allegedly owing and unpaid freight charges on coal movements to San Antonio, Texas. The case was held in abeyance for approximately two years pending resolution of several legal issues in other forums. A summary of the various proceedings involved and relevant facts follows.[2]

Following a decision of the United States Court of Appeals for the District of Columbia Circuit,[3] vacating and remanding two Interstate Commerce Commission

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[1] The Interstate Commerce Commission takes no position on the issue of interest or how it should be calculated (see Railroads' brief at 5, 33-43; San Antonio's brief at 28, 40-43).

[2] The background of this dispute is set forth in some detail in this Court's opinion in *San Antonio, Texas v. United States*, 650 F.2d 49, 51-52, *clarified*, 652 F.2d 422 (1981), and in *Burlington Northern v. United States*, 103 S. Ct. 514 (1982).

[3] *San Antonio, Texas v. United States*, 631 F.2d 831 (1980).

decisions setting maximum railroad rates for coal transportation to San Antonio, Texas,[4] a dispute arose over the rate to be charged pending a final decision in the remanded proceeding. Although the court's decision had expressed no opinion as to whether the rate was too high or too low, San Antonio maintained that the effect of the decision vacating the ICC's maximum rate prescriptions was to reinstate or revive a prior rate prescription, known as "San Antonio I",[5] and, accordingly, unilaterally reduced its payments to that rate level. The railroads argued that San Antonio was obligated to continue to pay at the rate level set forth in their tariff, which was set at the maximum level permitted by the vacated ICC decision.[6] Among other actions taken to enforce payment of their tariff rate,[7] the railroads asked the court of appeals to clarify its decision as not restoring the *San Antonio I* rate.

While that petition was pending before the court of appeals, the ICC acted to resolve the dispute, at least prospectively, by ordering San Antonio to pay the tariff rate. *San Antonio, Texas v. Burlington Northern Inc.*, 364 I.C.C. 887, 896-97 (1981) (App. at 30, 39-40).[8] Although the Commission explained why, in its view, applicable legal precedents should lead the court of appeals to clarify

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[4] *San Antonio, Texas v. Burlington Northern*, 359 I.C.C. 1 (1978) (*"San Antonio II"*), *modified*, 361 I.C.C. 482 (1979) ("San Antonio III").

[5] *San Antonio, Texas v. Burlington Northern*, 353 I.C.C. 405 (1976).

[6] *San Antonio, supra*, 631 F.2d 831. The court held the maximum rate prescriptions "arbitrary and capricious" and "without defensible rationale.

[7] The various proceedings before the Commission are catalogued in *San Antonio v. Burlington Northern*, 364 I.C.C. 887, 888-91 (1981).

[8] "App." refers to the Appendix of Railroad Appellants filed February 13.

its decision as *not* restoring *San Antonio I*, *id.* at 892 n.3 (App. 35),[9] the Commission did not purport to decide that question directly, out of deference to the court of appeals, where the railroads' petition for clarification on that question was then pending. Nevertheless, the Commission formally vacated the *San Antonio I* order to the extent that it may have remained viable after the D.C. Circuit's remand decision and ordered San Antonio to pay the then current tariff rate, *id.* at 897 (App. 40). The Commission explained (*id.* at 892 (App. 35)) that "there is little reason to believe that the *San Antonio I* rate prescription, which was established five years ago expressly as an interim measure to permit the traffic to begin moving, is supported either by current cost data or by current legal standards." In addition, the Commission noted that there had been significant changes in the governing legal standards which had not been taken into account in prescribing the *San Antonio I* rate,[10] *id.* at 894 (App. 37). Finally, the Commission concluded that it would be unjust to the railroads to permit the *San Antonio I* prescription to govern during the interim period pending a final decision on remand, because if the Commission determined that the railroads were entitled to charge a higher rate, they would nevertheless be unable to collect it for that interim period. *Id.*

This Court denied San Antonio's application to stay the Commission's order, *San Antonio v. Burlington Northern*, 650 F.2d 49, *clarified*, 652 F.2d 422 (1981) and San Antonio has been paying the tariff rate ever since. However, during the period of approximately ten months be-

[9] The Commission acknowledged its prior inconsistent position on the issue and explained why it had been mistaken originally. 364 I.C.C. at 892 n.3 (App. 35).

[10] The Commission's original *San Antonio I* rate prescription ante-dated two major amendments to the Interstate Commerce Act, the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. 94-210, 90 Stat. 31 (1976) and the Staggers Rail Act of 1980 (Staggers Act), Pub. L. 94-448, 92 Stat. 1895 (1980).

tween the effective date of the D.C. Circuit's decision, when San Antonio reduced its payments to the *San Antonio I* level, and April 1981, when the Commission's order to pay the tariff rate became effective, a disparity of $19 million—the difference between the tariff rate and the rate actually paid—accrued.

In May 1981, the D.C. Circuit issued its clarification opinion, holding that the effect of its earlier order vacating the ICC's maximum rate prescription was to revive the *San Antonio I* rate. *San Antonio, Texas v. United States*, 655 F.2d 1341 (1981). The Commission and the United States joined the railroads in urging the Supreme Court to reverse that holding. On brief, the government argued, *inter alia*, that by reviving the Commission's outdated *San Antonio I* rate prescription, the court of appeals effectively established the rate at a level which the Commission had found (in San *Antonio IV*, *supra*) to be unsupported by then current cost data and legal standards, thereby violating well-established principles concerning the ICC's primary jurisdiction over rail rates. Brief for Federal Respondents at 12-13, 16-29. The Commission and the United States also argued that the D.C. Circuit's decision effectively rewarded San Antonio's unilateral decision to pay a rate other than the published tariff rate during the ten-month period at issue—a result that could not be squared with the "filed rate doctrine" which requires adherence to published tariffs by shippers and carriers alike.[11] *Id.* at 34-39.

The Supreme Court reversed the D.C. Circuit's clarification decision. *Burlington Northern, Inc. v. United States*, —— U.S. ——, 103 S. Ct. 514 (1982). The Court held (*id.* at 521):

> By entering an order declaring that the *San Antonio I* rate order was "revived" for the period June

[11] See, *e.g.*, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Pennsylvania R.R. v. International Coal Co.*, 230 U.S. 184, 197 (1913).

> 1980-May 1981 the Court of Appeals did that which we have said a federal court may not do: *i.e.*, freeze the rate that railroads charge shippers prior to a decision by the Commission as to what a reasonable rate should be.

The Court made it clear (*id.* at 522) that the *San Antonio I* rate prescription had no continuing independent force and effect following the court of appeals' decision vacating the *San Antonio II* and *III* orders:

> Since the Commission prescribed a rate in *San Antonio I*, the argument is that this is the rate the railroads must charge. We disagree. *San Antonio I* was by it terms limited to "continue in full force and effect until . . . further order of the Commission," 355 I.C.C. 418. Absent a contrary indication from the Commission, *San Antonio II* terminated the vitality of *San Antonio I*.
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> * * *
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> In striking the orders in *San Antonio II and III*, the court's action operated to leave in effect the rates file, under the Commission's authority pending the Commission's redetermination of a reasonable rate and subject always to reparations to protect the shipper should the Commission find that their rates were too high. [Footnotes omitted].

The Court found it unnecessary to address arguments concerning the filed rate doctrine, *id.* at 522 n.10.

After the Supreme Court denied a petition for rehearing filed by San Antonio, the railroads filed a motion for summary judgment in the district court. San Antonio filed a motion to continue holding the district court proceeding in abeyance, based on alleged pendency of certain issues before the D.C. Circuit. That motion was granted (App. 42). However, after the D.C. Circuit denied a request for further briefing before that court (App. 43), the district court ordered briefing to proceed (App. 45).

The Commission moved to intervene and filed a statement of position (App. 84), in which it asserted that the Supreme Court had decided the revival question in the *Burlington Northern* case consistent with the Commission's own view (see pages 2-3 above) and that, contrary to San Antonio's position, no referral to the Commission was necessary on the issue.

On December 6, 1983 the district court issued a memordanum opinion granting the railroad's motion for summary judgment (App. 89). The court agreed that the Supreme Court had held that the rate in effect during the disputed period was the tariff rate, not *San Antonio I*, *id.* However, the court stayed execution of its judgment pending a final decision of the Commission in proceedings before the Commission: "This shall be done in order not to interfere with the primary jurisdiction of the Commission to determine the reasonableness of the tariff rate for the period in question", citing *Burlington Northern*, *supra*, 103 S.Ct. at 521 (App. 90). On December 27, the court issued its judgment (App. 92) in accordance with that opinion.

SUMMARY OF ARGUMENT

Before the Supreme Court's decision in *Burlington Northern*, a genuine dispute existed as to which of two rates was the "applicable" rate; that is, whether San Antonio was obligated to pay the tariff rate or a lower rate, based on the possibility that a prior Commission rate prescription had been revived. That question of rate applicability has now been definitively answered. The Supreme Court held that the rate in effect was the tariff rate, not the *San Anontio I* rate, and the district court was correct in so reading the Supreme Court's opinion. San Antonio's contrary reading of the Court's decision as not deciding that issue, but requiring yet another referral to the Interstate Commerce Commission, is patently erroneous.

The district court erred, however, in staying execution of its judgment pending disposition of San Antonio's rate

reasonableness claims before the Interstate Commerce Commission. The effect is to prevent the railroads from collecting the concededly applicable tariff rate pending final disposition by the Commission of San Antonio's rate reasonableness claims. Ironically, the court's stay order has virtually the same practical impact as the injunction against collection of the tariff rate which issued from the same court and was vacated by this Court in *San Antonio*, *supra*, 650 F.2d 49.

Since the Supreme Court's *Burlington Northern* decision, San Antonio stands in the same shoes as other shipper complainants before the ICC. Absent action by the Commission to suspend or otherwise hold down rates pending final disposition of reasonableness claims, San Antonio should be obligated to pay the tariff rate like all others (subject, of course, to reparations should it ultimately prevail on its reasonableness claim).

The district court's stay, rather than preserving the ICC's primary jurisdiction, potentially frustrates that jurisdiction, by creating an incentive for others to withhold payment of tariff rates.

I.

THE DISTRICT COURT CORRECTLY READ THE SUPREME COURT'S DECISION IN *BURLINGTON NORTHERN* AS DECIDING THE RATE APPLICABILITY QUESTION; NO REFERRAL TO THE ICC IS REQUIRED

San Antonio argues (brief at 31-39) that the district court erred in deciding the rate application dispute without referring the question to the ICC. The argument is based on the district court's reading of the Supreme Court's opinion in *Burlington Northern* (App. 89) as having *held* that "the rate in effect for coal shipment for the period in question was the tariff rate filed under the authority of the [I.C.C.], not the *San Antonio I* rate as contended by Defendant." In San Antonio's view, the

Supreme Court decided only that the ICC should decide the question, but did not itself resolve the question.

San Antonio's reading of the Supreme Court's opinion is quite simply inconsistent with the language of the Court's holding. The Court held (103 S. Ct. at 522):

> In striking the orders in *San Antonio II* and *III*, the court of appeals' action operated to leave in effect the rates filed under the Commission's authority pending the Commission's redetermination of a reasonable rate and subject always to reparations to protect the shipper should the Commission find that these rates were too high.[12]

San Antonio is, in effect, arguing that the Supreme Court could not have decided that issue because the issue before the Court was *who* could decide such questions, the ICC or the courts, and the Court decided that such questions must be decided in the first instance by the ICC. There is and was, however, no need to refer the question of rate applicability to the Commission because the Commission had already made its views clear on the question of "[w]hat rate should San Antonio be paying?" In *San Antonio IV*, *supra*, 364 I.C.C. at 891-97 (App. 34-40), the Commission provided a detailed explanation of why, if the *San Antonio I* rate had been reviewed, it should not have any continuing effect.[13]

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[12] See also the language quoted above at pages 5-6.

[13] The same considerations that led the Commission to conclude that the *San Antonio I* rate prescription had no continuing validity as of April 1981 are applicable to the period that is directly at issue here. For example, in prescribing the *San Antonio I* rate in 1976, the Commission did not have occasion to consider two major, subsequently enacted amendments to the Interstate Commerce Act, the 4R Act and the Staggers Act. Both statutes contain provisions directly relevant to the Commission's ratemaking responsibilities in cases such as the *San Antonio* case. *Burlington Northern*, *supra*, 103 S.Ct. at 522 n.7. The Commission found that the fact that ratemaking criteria in the new legislation were not considered in arriving at its *San Antonio I* prescription in 1976 was a more than

Although San Antonio is correct in noting that the Commission declined to rule directly on the question of whether the court of appeals' decision had the effect of restoring *San Antonio I*, it made its view clear on how that question should be resolved. The Commission expressed its view that application of appropriate principles of primary jurisdiction "should lead the court [of appeals] to clarify its mandate as*n ot* resoring *San Antonio I*", *id.* at 892 n.3 (App. 35) (emphasis added). Moreover, the Commission argued before the Supreme Court, *inter alia*, that the court of appeals erred in reviving "an outdated ICC rate prescription" (Brief for Federal Respondents at 12) and that "the court of appeals imposed a rate policy different from that expressly established by the Commission" in *San Antonio IV*, *id.* at 23. There was no reason then, and there is no reason now, to refer the question to the ICC because the Commission's position has been made clear.

Finally, San Antonio's argument that "the district court's ruling on the merits deprives San Antonio of due process rights" is baseless. For the reasons discussed immediately above, the district court correctly read the Supreme Court's holding in *Burlington Northern* and thus, if any due process rights have been cut off, it was the Supreme Court's doing. Of course, that is not the case; San Antonio has quite obviously had ample opportunity to be heard on the rate applicability question.[14]

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adequate basis for declaring the prescription invalid in 1981. (364 I.C.C. at 894 (App. 37)).

[14] San Antonio's reliance on 49 U.S.C. 10327 (brief at 38) in this context is misplaced. The Commission will, of course, comply with the specific requirements of that section upon issuance of its decision on San Antonio's reasonableness complaint. No separate decision by the Commission on the rate applicability question is required by the statute.

II.

THE DISTRICT COURT'S STAY OF ITS JUDGMENT WAS NOT REQUIRED TO AVOID INTERFERENCE WITH THE ICC'S RATE REASONABLENESS JURISDICTION

The only reason offered by the district court for staying execution of its judgment for the railroads was that "[t]his shall be done in order not to interfere with the primary jurisdiction of the Commission to determine the reasonableness of the tariff rate for the period in question," citing *Burlington Northern*, *supra*, 103 S. Ct. at 521 (App. 90).[15] The court erred in invoking the Commission's primary jurisdiction because, if anything, the court's stay frustrates rather than aids that jurisdiction, by effectively sanctioning San Antonio's refusal to pay the tariff rate.

In *Consolidated Rail Corp. v. National Ass'n of Recycling Indus., Inc.*, 449 U.S. 609, 612 (1981), the Supreme Court held that "[t]he authority to determine when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission." In this situation, the Commission has made clear its view that San Antonio should pay the tariff rate, pending a final decision on rate reasonableness.[16] See pages 3-4, 10 *above; San Antonio IV*, *supra*,

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[15] San Antonio, on brief, suggests additional bases for the district court's decision, including that the court was presented with evidence that "San Antonio's case for overcharges before the ICC was a compelling one on its merits" and that the district court was also presented with evidence that requiring payment would cause undue hardship to the citizens of San Antonio. San Antonio's own brief is the cited authority for its likelihood-of-success-on-the-merits argument, which should be weighted accordingly by this Court. Without conceding the hardships argument, it is nonetheless irrelevant. *See Pittsburgh, C., C. & St. L. Ry. v. Fink*, 250 U.S. 577, 582 (1919).

[16] As discussed above at page 10 & n.13, San Antonio's claim that the Commission has not directly ruled on the question of whether

364 I.C.C. at 891-97 (App. 34-40). The Commission explained that the *San Antonio I* rate level was unsupported by then current cost or legal standards and that it was inequitable to the railroads. Yet, by freezing the rate at that level pending a final decision on reasonableness by the Commission, the district court here has accomplished almost precisely what this court said the same court could not do by injunction in *San Antonio, supra*, 650 F.2d at 53, and what the Supreme Court said the court of appeals may not do: "freeze the rate that railroads charge shippers prior to a decision by the Commission as to what a reasonable rate should be." *Burlington Northern, supra*, 103 S. Ct. at 521.[17]

Those cases relied upon by San Antonio (brief at 24 & 25 n.21) in which the courts have invoked the primary jurisdiction doctrine to require (or not require) that certain questions be referred to the ICC are inapposite. Clearly, courts do and must refer issues such as applicability or reasonableness of rates to the Commission where resolution of the issue is necessary to a decision by the court and the issue is one within the Commission's primary jurisdiction. *E.g., United States v. Western Pacific R.R.*, 352 U.S. 59 (1956). However, in this case, the reasonableness of the rates was not an issue before the court and its resolution was unnecessary to decide the issue at hand, *viz*, rate applicability.

Several of the decisions do suggest that a stay of judicial proceedings may be appropriate pending a referral to the ICC concerning rate reasonableness. See

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San Antonio I was revived for the relevant period is irrelevant, first and foremost because the Supreme Court finally resolved the issue and also because that is precisely how the ICC advised the court of appeals and the Supreme Court that the question should be resolved.

[17] As the Court pointed out there, 103 S. Ct. at 521-22, the result is particularly inequitable in these circumstances because it requires the railroads to accept a rate of return which was found too low by the Commission in 1978.

e.g., Western Transp. Co. v. Wilson & Co., Inc., 682 F.2d 1227, 1232 (7th Cir. 1982); *Chicago, R.I. & Pac. R.R. v. Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385 (8th Cir. 1970). But in neither acse is the question of rate applicability pendente lite discussed, nor was the "filed rate doctrine" considered or applied. The doctrine requires the carrier to collect, and the shipper to pay, the tariff rate on file with the Commission, regardless of the underlying lawfulness of the rates. *Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1923); *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913). The carrier "has not only the right but also the duty to recover its proper charges for services performed." *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 343 (1982). While a major consideration underlying the doctrine is the avoidance of discrimination, *id.* at 344,[18] it is "equally important to aid the efforts of a carrier in collecting published charges in full." *Lowden v. Simonds-Shields-Londsdale Grain Co.*, 306 U.S. 516, 520-21 (1939).

Finally, the district court's stay creates a broader potential interference with the Commission's primary juris-

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[18] San Antonio is correct in arguing (brief at 22-23) that not all reasons underlying the "filed rate doctrine" are applicable in this situation. For example, it is probably correct that no claim for discrimination under the Interstate Commerce Act, 49 U.S.C. 10741, could lie here, and, as a practical matter, the history of litigation between San Antonio and the railroads over this rate belies any suggestion of secret rebating or favoritism by the railroads through accepting less than the tariff rate. The parties are not in "cahoots." Nevertheless, the doctrine has a statutory basis under the Interstate Commerce Act. Under 49 U.S.C. 10761, a "carrier may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff. . ." There are civil and criminal penalties for receiving payment at less than the tariff rate. 49 U.S.C. 11902, 11903. See also *Western Transp. Co., supra*, 682 F.2d at 1231 ("Congress did not create a flexible standard for courts to apply in accordance with facts, equities, or economic realities of a particular case. It forbade carriers to receive any different compensation from the rate in the applicable tariff.")

diction—by establishing an incentive for shippers to file complaints with the Commission, while withholding payment of the tariff rates, in hopes that the federal courts would sanction such violations of the filed rate doctrine. Such a possibility would undermine the ratemaking scheme under the Act, which has reposed questions concerning the timing of railroad rate increases with the Commission, *Burlington Northern*, *supra*, 103 S. Ct. at 521.

CONCLUSION

The district court's decision granting the railroads' motion for summary judgment should be affirmed. The district court's stay should be set aside.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March 1984, I have served accurate and true copies of the Brief of Intervenor Interstate Commerce Commission on the following parties by first class mail:

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